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A NEW LEGISLATION: REMARKS ON THE DRAFT *RESTATEMENT* OF PRODUCTS LIABILITY†

Marshall S. Shapo*

Because this Symposium has been so agreeably conducted, I would like to begin by discussing areas of potential agreement. I identify at least three such happy coincidences.¹

Kent Syverud implied one of these areas of agreement when he mentioned my book, *A Nation of Guinea Pigs*.² I had not thought specifically of the book in preparation for these remarks, but it now occurs to me that I might summarize in a sentence or two a thesis of that work, in which I invented the label “market experimentation.” That label seeks to capture the idea that in any modern society, all of us are constantly the experimental subjects of various kinds of innovation in ever-widening circles of product distribution.³ Although the title of the book uses the somewhat theatrical phrase “guinea pigs,” I employed the term “market experimentation” descriptively, to frame a process that provides benefits through innovation for most of us most of the time.

One of the main subjects of this Symposium is those by-products of beneficial goods—we have now learned to call them externalities—that injure people. A second point on which I suspect most would agree is that our goal is to keep within acceptable bounds the error rate in legal decisionmaking regarding the socially desirable level of externalities.

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This essay puts in written prose the spoken prose of a speech. Although the language of the essay is somewhat more formal, I have tried to capture the flavor of the speech as given and its relationship to the stimulating presentations of the Colloquy.

1. An additional area of essentially unanimous agreement among the participants at the Symposium, however fervent their substantive disagreements, was that the staff of the *University of Michigan Journal of Law Reform* conducted a superb conference.

2. Kent Syverud, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 170 (Mar. 23, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*) (citing MARSHALL S. SHAPO, *A NATION OF GUINEA PIGS* (1979)).

3. See SHAPO, *supra* note 2, at xiv (defining market experimentation as “the ongoing inquiry into hazardous effects, using members of the general public as subjects, that is a necessary part of the conduct of new activities and the marketing of new products”).

A third area of widespread agreement concerns the centrality of the defect concept to the discussion and debate about products liability law. As Jim Henderson said in his remarks, the defect concept is the heart and soul of the controversy.⁴ The way we speak about the defect concept has implications across a broad spectrum of jurisprudence, which I only touch in this commentary. These include implications for judicial interpretations of the concept itself, for the theory of liability, for the evidentiary requirements to prove a case, for analysis of the process of selling products, for jury instructions, and, finally, for examination of the feedback loop between law and culture.

This being a law school in a university, I would like to begin my discussion of the present draft not with doctrinal analysis, but rather by attempting to frame the question from a broader set of perspectives. I shall draw on the intricate relations of law with the society it governs and the reflection of those relations in the literature that remains at the heart of great universities.

Professor Latin colorfully referred this morning to Saturn and Jove and their thunderbolts.⁵ An evocative parallel theme would involve viewing the current law of products liability as a modern legal version of Greek tragedy. In this script, the American Law Institute (ALI) is the protagonist caught in the traditional toils of a few unfortunate decisions leading up to the present *Restatement* draft.

Among the several perspectives from which we might view the subject, obviously, is that of law. At one pole of legal analysis is the traditionalist approach of slaving away at reading cases and trying to decipher their meaning as modestly as one can. At the other pole is the wry view, as expressed by one leading member of the ALI, that reading cases is like interpreting Rorschach tests—the interpretation tells you mostly about the reader.⁶

Another point of view is that of culture. Adopting that perspective forces us to recognize the influence of culture on the

4. James A. Henderson, Jr., Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 72, 78 (Mar. 22, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).

5. Howard A. Latin, Remarks at the Colloquy on Products Liability: Comprehensive Discussions on the *Restatement (Third) of Torts: Products Liability* 113 (Mar. 23, 1996) (transcript on file with the *University of Michigan Journal of Law Reform*).

6. See Bill Wagner, *Reviewing the Restatement*, TRIAL, Nov. 1995, at 44, 46 ("During the debates, the executive director of the ALI commented only half jokingly that reading cases is like reading a Rorschach test—you sometimes see something in a case because it is what you were hoping to find.").

processes of selling and buying.⁷ More specifically, it requires us to take account of the influence of media on decisions to purchase or encounter products.⁸

Yet another viewpoint from which we can examine the *Restatement* draft is that of politics, specifically comprehending the role of politics in the making of what heretofore has been labeled private law. This perspective seems critical to me because of a fundamental decision by the ALI and its reporters to act as brokers of competing political forces.⁹ The reporters have done this in addition to drawing on their own policy views—views that were well developed, given their own positions as scholars of the first magnitude.¹⁰

The complexities of the subject, viewed from this perspective, are evident. They inhere, in part, in the legislative character of the project of drafting a restatement, in the lack of a true legislative character in the ALI, and in the broader political background of the subject. The key element in this mix is the frank legislative approach that has characterized the drafting process. This approach has candidly viewed the ALI as solving a public policy problem. It leads naturally, if not inevitably, to the analogy of cases as Rorschach blots. It may not be amiss to describe this approach as post-modernism with a vengeance.

I absorbed an emphatic lesson about the politicization that surrounds the discussion of the proposed *Restatement* after I wrote an article featuring that idea.¹¹ Only after that article

7. Cf. Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567 (1995) (exploring generally the relationship of tort law to culture).

8. See generally Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

9. See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 645–46 (1995) (explaining the background of this approach).

10. The Reporters' writings on the subject are substantial, spanning three decades. They include: James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982); A.D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976).

11. See Shapo, *supra* note 9, at 643–46, 682–84, 685–87.

was published, in the days and weeks leading up to the vote on this subject in the 1995 annual meeting of the ALI, did I become aware of a veritable barrage of mail aimed to get out the vote. That flood of mail, I was told, went to members of the ALI who are also members of law firms whose client interests might have led them to support the current proposals.¹² These institutional realities made it clear that it is difficult to address the specifics of this proposal, and of this process, without comprehending an important contrast. This contrast is the difference between the image of restatements that I suppose was inculcated in me in law school—as authoritative descriptions of the law—and the reality that the ALI has now become a sounding board for essentially political discussion.¹³

One of the most telling documents in the intellectual history of the *Restatement* is a remarkable law review article. That article, written by Professors Henderson and Twerski for the Cornell Law Review, explicitly served as a prospectus for this restatement project.¹⁴ Go back and look at that article through the prism of this Symposium. With respect to the two most controversial issues throughout this Symposium, that of the basic test for defect and that of the requirement of a reasonable alternative design, there has been relatively little change in the reporters' positions. Indeed, if anything, there has been a kind of hardening of their support of risk-utility analysis as the sole test for design defect.

In ruminating on the recent history of ALI discussions of this project, I think of one incident as particularly symbolic. This is a dramatic moment in the discussions on the floor of the annual meeting of the ALI in 1994. On that occasion, Herbert Wechsler, the distinguished former director of the Institute, rose to express his "anxiety about the draft," and his belief that, although the draft had "great merit," the reporters could "come up with a much improved draft."¹⁵ That remarkable speech awakens in my memory a quotation that a former dean of mine

12. A later enactment of this kind of drama in ALI politics has been well publicized. See, e.g., Jonathan Groner, *Insurance Lobby Aims at Normally Staid ALI*, LEGAL TIMES, June 10, 1996, at 1, 4 (describing use by insurers of "a wide array of modern techniques of persuasion in an effort to change the ALI's approach to a hotly disputed question that touches on legal ethics and the lawyer-client relationship").

13. See Shapo, *supra* note 9, at 645-46.

14. See James A. Henderson & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

15. Herbert Wechsler, *Continuation of Discussion of Restatement of the Law Third, Torts: Products Liability*, 71 A.L.I. PROC. 153, 194 (1994).

was fond of mentioning at points of high tension in faculty meetings. Though the quotation is religiously focused, I invoke it now in the most secular spirit: "I beseech you, in the bowels of Christ, think it possible you may be mistaken."¹⁶

Professor Henderson yesterday reiterated a position that he has defended with admirable constancy for the more than twenty years I have known him. Over that period, he has stressed the need for rules and relative certainty in the law.¹⁷ I would put alongside that another ideal, on which I believe he and I would agree. Learned Hand may have best expressed this ideal in his remarkable tribute to Cardozo. Using the gender bias of this time, he wrote: "the wise man is the detached man."¹⁸

I speculate that it must have been very difficult, and it must continue to be very difficult, for the reporters to remain dispassionate when they have invited commentary on the subject from so many politically interested groups. Because I have spoken in relatively free form, I have not plumbed the particulars of the arguments about the consumer expectations test versus the risk-utility test and of the reasonable alternative design controversy.¹⁹

In addition, I would suggest that there are a number of considerations that a proper *Restatement* should take more into account than does this draft. These considerations include the importance of the process of product promotion, a factor whose crucial nature we all know as individual consumers, if not as lawyers. They also include the complexity of the intellectual process in which any judge engages to decide a case in this area. In my understanding, that is a very plural process rather than one limited to a single set of considerations.²⁰

16. Letter from Oliver Cromwell to the General Assembly of the Church of Scotland (Aug. 3, 1650), in *FAMILIAR QUOTATIONS—JOHN BARTLETT* 247 (Justin Kaplan ed., 16th ed. 1992).

17. For a sampling of Professor Henderson's perspective across this period, see James A. Henderson, Jr., *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. PITT. L. REV. 761 (1990) and James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976).

18. Learned Hand, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 9, 10; 52 HARV. L. REV. 361, 362; 48 YALE L.J. 379, 380 (1939).

19. For detailed analysis on these issues, see Shapo, *supra* note 9, at 665-77.

20. See generally AMERICAN BAR ASSOC. COMM. ON THE TORT LIABILITY SYSTEM, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW 4-1* (1984) (M. Shapo, Reporter) (summarizing the "pluralistic nature of tort law").

Finally, using as a point of departure the requirement of a reasonable alternative design, I would suggest that a particularly seething controversy concerns an escape hatch from liability that Jim Henderson has so powerfully laid out.²¹ This is the idea that there should be no liability for categorically defined products. The recent effusion of cigarette litigation provides perhaps the most vigorous challenge to that notion.

Let me close by returning to the theme of classical tragedy. Obviously one cannot fault the reporters for their "can't helps." If they drafted anything other than their can't helps, they would not be true to themselves. This feature seems central to the tragedy: the errors of the draft are the predestined outcome of the reporters' most deeply held views. As to the controversies we have been discussing, it would appear that to ask the reporters to yield on these cherished provisions would be as if one had asked the drafters of the Constitution to give up the Commerce Clause.

That leads us to the question of how the play will end. Perhaps, I suggest hopefully, the presently tragic drama in which the ALI finds itself an actor will play out differently. Finally, I will suggest that one may at least take some comfort in the fact that judges, and not the drafters of the proposed *Restatement*, will write the authoritative, ongoing script.

21. Henderson, *supra* note 4, at 85-86.